In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 373

LADOGA CANNING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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The petitioner, Ladoga Canning Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on June 22, 1943 reversing the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 4-6) is not reported. The opinion of the Circuit Court of Appeals (R. 14-20) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 22, 1943. (R. 13.) Jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended. (28 U. S. C. 347(a).)

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

The constitutional provision and the statutes are quoted in the appendix.

QUESTION PRESENTED.

Is a seizure of goods pursuant to the Federal Food, Drug and Cosmetic Act in violation of the Fourth Amendment to the United States Constitution when the warrant of seizure and monition issued and the seizure was made without a showing of probable cause supported by oath or affirmation?

STATEMENT.

Alleging that they were adulterated within the Federal Food, Drug and Cosmetic Act because they contained decomposed material, the United States instituted a proceeding on April 9, 1942 in the United States District Court for the Northern District of Ohio, Eastern Division, against 935 cases of tomato puree which are owned by petitioner. (R. 2-3.) The prayer of the complaint sought a writ of attachment and monition, seizure of the goods, and their condemnation for destruction or sale. (R. 3.) Upon filing of the complaint and without any affidavit or showing by respondent, a deputy clerk of the District Court issued a warrant of seizure and monition to the United States Marshal who thereupon seized petitioner's goods.

Petitioner filed a special appearance and moved to quash the warrant and the seizure and for return of the goods on the ground that the warrant of seizure and the seizure were in violation of the Fourth Amendment to the United States Constitution because the warrant was issued without a showing of probable cause supported by oath or affirmation. (R. 3-4.) The District Court sustained the motion, dismissed the complaint, and ordered return of the goods. (R. 7.) Respondent promptly filed its notice of ap-

peal (R. 6) and approximately a week later the District Court stayed its order in respect of return of the goods. (R. 7.) Subsequently it denied petitioner's motion to modify this stay. (R. 8.)

Petitioner then filed a motion in the Circuit Court of Appeals for dissolution of the stay order. At the hearing of this motion petitioner and respondent argued the merits of both the motion and the appeal and jointly requested a decision on the merits as well as on the motion. On June 22, 1943, the Circuit Court of Appeals entered its judgment reversing the judgment of the District Court, overruling petitioner's motion for modification of the stay order, and remanding the cause to the District Court for further proceedings. (R. 13.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the warrant of seizure and the seizure of the goods were not in violation of the Fourth Amendment to the United States Constitution notwithstanding the warrant issued and the goods were seized without a showing of probable cause supported by oath or affirmation.

2. In overruling petitioner's motion for dissolution of the order of the District Court staying execution of its earlier order for return of the goods to petitioner.

3. In reversing the judgment of the District Court, and in remanding the cause to the District Court for further proceedings.

REASONS WHY THE WRIT SHOULD BE GRANTED.

The decision of the Circuit Court of Appeals is in probable conflict with the decision of this Court in *Boyd v. United States,* 116 U. S. 616, and with principles announced in *Carroll v. United States,* 267 U. S. 132. It presents a

substantial federal question of great importance which has not been specifically answered by this Court, which concerns the applicability of the Fourth Amendment to seizures of property in proceedings that are criminal in substance but not in form, and which is inherent in every seizure of goods pursuant to the Federal Food, Drug and Cosmetic Act. The decisions in this case, in *United States v. Eight Packages and Casks of Drugs*, 5 F. (2d) 971, and in *United States v. Eighteen Cases of Tuna Fish*, 5 F. (2d) 979, clearly indicate that there is disagreement concerning the applicability of the Fourth Amendment to cases of this kind and more particularly concerning the scope of the exceptions to the rule of *Boyd v. United States* announced by Mr. Justice Bradley in his opinion.

ARGUMENT.

1. The proceeding instituted by respondent seeks a forfeiture of petitioner's property for violation of a public law. Pursuant to a warrant issued by a deputy clerk of the District Court without support of any affidavit or showing by respondent, this property has been summarily seized and placed beyond petitioner's dominion and control upon the strength of allegations in respondent's complaint that the property constitutes adulterated food within section 402 (a) (3) of the Federal Food, Drug and Cosmetic Act. (21 U. S. C. 342 (a) (3).) The seizure cannot be justified on the ground that the food *is* adulterated or dangerous to others. That fact remains to be determined and its determination is the sole purpose of the proceeding instituted by respondent and the reason for the provision for hearing specified in section 304. (21 U. S. C. 334.) If it can be justified at all, the seizure can be justified only on the ground that there was probable cause for believing that the food was adulterated in violation of the Act, for surely an agent of respondent may not indiscriminately seize the property of anyone as it may suit his fancy without regard

to the unreasonableness of his assertion or belief that it constitutes adulterated food or drugs.

To say that this is a civil proceeding is not an answer to petitioner's claim that the Fourth Amendment, with its specific requirements, is applicable to the seizure involved here. Certainly there is nothing in the language of the Amendment which supports a general proposition that it is inapplicable to official seizures in connection with civil proceedings, and the decision in *Boyd v. United States*, 116 U. S. 616, is authority that the protection it affords is not so limited. There the United States instituted proceedings to forfeit glass allegedly imported in violation of the revenue laws. A statute authorized the United States attorney to file a motion for an order compelling the production of any book, invoice or paper material to his proof. Allegations in the motion were to be deemed confessed if the document was not produced. Over his objections, the claimant was ordered pursuant to this statute to produce an invoice which was admitted in evidence. Judgment of forfeiture resulted. The claimant was not indicted and there was no charge of criminality although the act provided criminal penalties for violation of its provisions. On writ of error, this Court held that the compulsory production of the invoice constituted an unreasonable search and seizure in violation of the Fourth Amendment.

With specific reference to the nature of the forfeiture proceeding, Mr. Justice Bradley stated:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, * * *" (pp. 633-634.)

It is undoubtedly true that there are official seizures in civil proceedings to which the protection of the Fourth Amendment does not extend. Instances are suggested in Mr. Justice Bradley's opinion. (116 U. S. 616, 624.) But as the opinion conclusively shows, this falls far short of proving that the Fourth Amendment does not reach a seizure in a proceeding criminal in substance though civil in form involving an alleged violation of a public law which is penal in nature and which exacts drastic forfeitures. Like the act involved in *Boyd v. United States,* the Federal Food, Drug and Cosmetic Act does not provide merely for proceedings to forfeit the offending article. It enumerates twelve classes of prohibited acts (21 U. S. C. 331), among them the act of introducing adulterated food in interstate commerce (21 U. S. C. 331 (a)), and provides penalties of fine or imprisonment, or both, for violations. (21 U. S. C. 333.) This similarity between the statutes is not the only respect in which the *Boyd* case and this case are alike. There the seizure produced evidence which the United States could then offer in a criminal action against the claimant and here the same thing is true. By seizure of the food, if in fact it is adulterated, respondent has procured the best possible evidence of a major element of the crime of introducing adulterated goods in interstate commerce. Indeed, Section 304 (c) expressly permits respondent to obtain a sample of the food which has been seized. (21 U. S. C. 334 (c); cf. *United States v. B. & M. External Remedy,* 36 F. (2d) 53.)

From this comparison of the instant case with the *Boyd* case, it is evident that both involved *in rem* proceedings, civil in form but criminal in substance, to forfeit property for violation of a public law which provided in addition for criminal action against the party responsible for the offending character of the goods. Both involved the procuring of evidence which could be used in a criminal proceeding against the person claiming the goods. It may

be that in the instant case evidence of criminality was not the primary object of the seizure, but this difference is not material; the question is whether there was an unconstitutional search and seizure. An arrest without a warrant is plainly not designed to obtain evidence of crime but it may nevertheless be prohibited by the Fourth Amendment. (Cf. *Carroll v. United States*, 267 U. S. 132.) In consequence the very premises of the decision by the court below that the *Boyd* case is distinguishable should have induced it to reach exactly the opposite conclusion.

2. In addition to its inconsistency with the decision of this Court in *Boyd v. United States*, the decision of the Circuit Court of Appeals is inconsistent with principles announced in *Carroll v. United States*, 267 U. S. 132. There an arrest of two men, search of their auto, and seizure of whiskey, all without a warrant, were held not to constitute an unconstitutional search and seizure which invalidated a conviction because the whiskey was admitted in evidence in a trial of the men for violation of the National Prohibition Act. Search and seizure without a warrant were justified because of the "necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." (p. 153.) It was held, however, that the "measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." (pp. 155-156.) Thus, even a search and seizure without a warrant may be made only when the official has probable cause for believing that the goods to be seized violated the statute.

Here the food, not yet proved to be "contraband," was stored in a Cleveland warehouse building not very many blocks from the office of the United States Marshal. There does not appear to be any reason and respondent has not demonstrated why seizure of this food would have been permissible in the absence of an official writ authorizing it, and the *Carroll* case is authority that even a seizure without such a writ must be grounded upon a showing of probable cause, a showing which respondent has never made. The perfunctory issuance of a warrant of seizure and monition by a deputy clerk of the District Court merely upon filing of respondent's complaint is surely not a substitute. In the absence of an appropriate showing of probable cause for believing, not conclusive evidence obviating the necessity of a trial to establish, that the food was adulterated, the seizure may as well have been made by the Marshal without the warrant or by an agent of the Federal Security Administrator.

If there was probable cause for believing the goods were adulterated, it should have been shown and supported by oath or affirmation. If probable cause was wanting, the seizure should not have been made. In the words of the Virginia resolution urging the adoption of the first ten amendments to the Constitution "all warrants * * * to search suspected places, or seize any free man, his papers or property, without information upon oath * * * of legal and sufficient cause, are grievous and oppressive * * *." House Document No. 398, 69th Cong., 1st Sess., p. 1030; see also New York, North Carolina and Rhode Island resolutions, pp. 1036, 1046, 1054. This is a basic principle of the decision of this Court in *Carroll v. United States* and is equally apparent in the language of the Fourth Amendment. Failure to recognize it is a fundamental error in the decision of the Circuit Court of Appeals.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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